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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. 231

ANNA DESPER, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. DESPER, JR., DECEASED,
Petitioner,

vs.

STARVED ROCK FERRY COMPANY,
A CORPORATION,
Respondent.

RESPONDENT'S BRIEF ON WRIT OF CERTIORARI.

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VS.

STARVED ROCK FERRY COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF ON WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinion Below.

The opinion of the Court of Appeals is reported in 188 F. 2d 177; it will also be found at R. 274-282.

Jurisdictional Statement.

This Court's jurisdiction has been invoked by petitioner under 62 Stat. 928, 28 U. S. C. A. Sec. 1254. The judgment is a decision as to rights claimed by petitioner under the Jones Act, 41 Stat. 1007, 46 U. S. C. A. Sec. 688.

Statement of Facts.

This case arises from a suit filed under the Jones Act against the respondent for damages for fatal injuries sustained by petitioner's intestate in the State of Illinois in the course of his employment. At the time of the accident, respondent and all its employees were bound by and subject to the Workmen's Compensation Act of Illinois, which respondent pleaded in defense to the suit, and which defense the trial court overruled. The case was submitted to the jury, a verdict rendered for petitioner and judgment entered thereon. The Court of Appeals reversed the judgment and remanded the cause with directions to enter judgment for the respondent.

Starved Rock Ferry Company, respondent herein, owned and during the summer months of each year operated ferry boats on short sight-seeing trips—the round trip taking about one hour and twenty minutes—on the Illinois River in the vicinity of Starved Rock in the State of Illinois. (R. 62, 101, 103, 104.)

The equipment of the respondent consisted of five gasoline-powered flat-bottomed ferry boats and three barges which had no motive power. (R. 101, 103.)

In the operation of its five sight-seeing passenger ferry boats during the summer months, respondent also used

the three barges. (R. 103.) The three barges had no engines or propellers and during the summer season when respondent's sight-seeing passenger boats were in operation on the Illinois River, the barges were anchored by cables to the shore and were used as landing docks remaining stationary throughout the season. (R. 84, 88, 103.)

The five ferry boats were each operated by only one man and in the 1947 season, respondent had three operators; however, none of the operators was especially assigned to any one boat. (R. 101.) They had a draft of about two to two and one-half feet, were about fifty-five to sixty feet in length and had a tonnage displacement ranging from five to fifteen tons. (R. 62, 101, 103, 109, 110.)

The largest of the three barges was used by respondent during the summer season as a ticket office, waiting room, machine and tool shop. (R. 89, 128, 228, 229.) This barge was wooden with a flat bottom and was about twenty-six feet wide, one hundred ten feet long and sixteen feet high. It had two stories and the second floor was an apartment in which one Claudnic, then respondent's manager, with his wife had lived continuously both winter and summer for some nine years. (R. 89, 128, 129, 130, 131.) This houseboat barge had no engine, propeller, whistle, bell or steering apparatus. (R. 129.) It had no means of generating electricity but obtained current and water from land connections. (R. 84, 131.)

The other two barges had single decks and had no special equipment of any kind on board.

During the summer season respondent in the operation of its sight-seeing ferry boats was required to observe

the regulations of the United States Coast Guard Regulations (R. 104, 122), and each of the men who operated a sight-seeing ferry boat was required to have an operator's license which certified the holder of such license could operate motor boats under sixty-five feet in length carrying passengers for hire on the navigable waters of the United States. (R. 101, 104, 132, 224.) Such license as was required by United States Coast Guard Regulations for the operation of respondent's sight-seeing ferry boats was not a pilot's license but was merely a motor boat operator's license. (R. 149.) None of respondent's employees was a pilot. (R. 101.)

From the evidence it seems there is a great difference between an operator's license and a pilot's license. A pilot's license pertains to a certain section or sections of navigable waters with which the pilot is familiar; whereas, an operator's license is good anywhere and simply means the operator knows how to run a motor boat. (R. 132.) In addition, when the boats were operated during the summer season they were required to meet certain Coast Guard requirements as to running lights, life preservers and fire extinguishers. (R. 68, 105, 137, 173.)

In order to move the three barges over the water of Edwards Run at the close of the summer season, upon notification to the personnel located at the dam some six miles west, which was a step-by-step lock dam controlling water elevation, the locks would be operated so as to raise the water in Edwards Run approximately eight inches above its average two foot depth, so that defendant's three barges and five sight-seeing ferry boats could be brought into Edwards Run which was used as winter quarters and which sometimes was re-

ferred to as Buffalo Rock Boat Yard. (R. 50, 126, 127, 137, 144, 169.)

There the five boats would be taken out of the water and blocked up on marine tracks in the adjacent Buffalo Rock Boatyard. (R. 126, 130.) The three barges were left in Edwards Run and the largest of the three barges was anchored to the bank by means of spud spars and cables and sometimes during the winter months it floated and sometimes it rested in the mud. (R. 107, 130.) During the winter the two smaller barges were fastened to the large barge. (R. 107.)

Edwards Run at one time was a creek known as County House Creek which emptied into the Illinois River. The land originally on either side of the creek was used as pasture and farm land. (R. 169, 170.) After the Starved Rock dam, some six miles to the west was built—variously estimated by the witnesses as being sometime between 1930 and 1933—the water of the Illinois River was raised and what previously was County House Creek became Edwards Run. (R. 50, 131, 145, 171.)

Edwards Run was undredged and was not over two feet deep at its deepest spot. (R. 57, 105, 127.) The water was filled with a considerable growth of weeds and its depth varied only in springtime when the floods came. (R. 128, 136.) It was not deep enough for a tugboat to enter. (R. 107.) Rowboats could be and were used in it for duck hunting, but rowboats with outboard motors had to enter it carefully and go very slowly or they would hit some obstruction and shear their steering pin. (R. 59, 128.) No other boats ever used the water except those of the respondent. (R. 57, 169.)

To the west of Edwards Run was another inlet body of water which merged into the Illinois River at almost

the same point as did Edwards Run. This other inlet body of water was known as Consumers Run and was used by the Consumers Company to haul gravel from an island in the middle of the river on barges to a railroad spur track at the upper or north end of Consumers Run. (R. 53, 114.) Consumers Run was about five feet in depth. (R. 105.) Consumers Run was not in any way connected with Edwards Run but was a separate body of water except the two inlets—Consumers Run and Edwards Run—merged at the edge of the Illinois River. (R. 132, 136.) The Consumers Company dredged Consumers Run about every other year. (R. 124.)

With the opening of the summer season, the sightseeing boats had to be jacked up, timbers removed, dollies placed under them and then moved by dollies over the marine tracks into Consumer's Run and thence to the Illinois River. (R. 53, 67, 78, 92.) The barges would be floated out of the Edwards Run inlet to serve again as ticket office and landing docks. (R. 84, 88, 89, 103, 127, 128, 228, 229.)

Petitioner's decedent had worked for respondent in 1947 from April 3 until December 19. (R. 86, 117.) After having left school he had worked as an arc welder in the Seneca Ship Yards. (R. 86.) After working as a welder for approximately three years he had been a truck driver in the Army for a little more than two years. (R. 86.) After he came out of service with the Army, he started as a welder for the Meyer Furnace Company where he suffered a broken foot. (R. 86.) He next started working for respondent in April 1947. (R. 86.) While working for respondent in 1947, petitioner's decedent did all kinds of general labor and helped with the outfitting and preparation work getting the boats

ready for the summer season, which lasted from June 1 until the end of October. (R. 101, 118.) In June 1947, he obtained a license to operator motor boats carrying passengers for hire from the United States Department of Commerce, Bureau of Marine Inspection and Navigation. (R. 87, 150, 224.) After having received such license, Tom Desper operated respondent's sight-seeing boats and also did other general maintenance work for the respondent (R. 102, 105, 129); however, no special boat was ever assigned to him. (R. 101.)

During the interim following the close of the 1947 season at the end of October until his employment for the year terminated December 19, Tom Desper helped in the work of taking the boats out of the water preparing them for winter. (R. 87.) There is no record of his having done any work of any nature between December 19, 1947, and March 15, 1948, when he again began working for respondent. (R. 89, 122, 166.)

After beginning work for respondent March 15, 1948, Tom Desper assisted in the general work of cleaning, priming the metal, painting, varnishing and water-proofing the sight-seeing boats which were standing blocked on timbers on the marine rail track. He helped with whatever work there was to be done including helping fabricate a boat which was being rebuilt, assisted in welding, and did other general work. (R. 61, 62, 109, 138, 139.) While working for respondent, the decedent lived at home with his parents and other members of his family. (R. 163, 164, 165.)

None of the work being done on the boats during the month of April 1948 required a license of any kind from the Coast Guard, the Department of Commerce or from any other department of the Federal Government. (R.

132.) There were no Coast Guard regulations regarding the respondent's three barges or the passenger sightseeing boats when they were in winter quarters in Edwards Run. (R. 132, 137.)

On April 26, 1948, the day on which the accident occurred, the five motor launches were resting on the rails blocked up on timbers. (R. 67, 92.) (Respondent's Exhibit No. 15 is helpfully illustrative—R. 177, 336.) The three barges were lying in Edwards Run. None of the witnesses could say whether the bottom of the houseboat barge was resting on the bottom of the inlet or was afloat on its shallow water. (R. 77, 78.)

On April 26, 1948, five or six men, including respondent's president, Charles Birkenbuel, Tom and James Desper, respondent's manager, Claudnic, Robert Kennedy, and Michael Lewis comprised the working force. (R. 61, 62, 64.) All of these men, were working on the houseboat barge. Kennedy and the other men assisting him—Lewis and the two Despers—were working at reconditioning life preservers which were intended to be placed on respondent's boats. (R. 68, 83, 93, 173, 120.)

While the men were thus engaged respondent's president, Birkenbuel, was working on a fire extinguisher, one of five respondent had purchased intending to place one in each of the five sight-seeing boats. (R. 68, 69, 111, 112.) Neither the life preservers on which the men were working, nor the fire extinguishers were to be used on the houseboat barge where the work was being done. (R. 133.) Suddenly the fire extinguisher on which respondent's president, Birkenbuel, was working exploded killing both him and petitioner's intestate. (R. 72, 94, 150.)

On the hereinbefore mentioned and described house-boat barge where the fatal accident occurred there was no ship discipline or regulations and the men worked the same as they would in a factory or any other place. (R. 182.)

On April 26, 1948, the date of the accident, the work of getting the respondent's boats ready for the summer season was about three-fourths completed. (R. 109, 120.) Respondent's manager, Claudnic, testified there was about three weeks more work to be done on the boats (R. 109), and that the boats went into the water and began operations May 9, 1949. (R. 181.) Kennedy who had been hired by respondent to do the painting job on the boats testified he finished his work between May 18 and May 21, 1948, (R. 61, 160), and as previously stated, at the time of the accident respondent's five passenger sight-seeing boats were still on the marine rails resting on wooden blocks or timbers. (R. 64, 92.)

Respondent's president, Birkenbuel, who was killed in the same accident with Tom Desper, had hired the latter to work in 1948. The hiring was verbal and Claudnic, respondent's manager, testified he did not know the terms of the arrangements between Birkenbuel and the deceased, Tom Desper, though at one point in his testimony, Claudnic, when asked if he did not know Tom Desper had been hired to help get the boats prepared for operation in 1948 and then to work as an operator when the boats were in the water, answered affirmatively. (R. 110, 133.) He further testified that so far as he knew none of the employees was under contract for a certain time. (R. 133, 135.)

Claudnic also testified the men could leave any time they wanted and that if Birkenbuel "found something

that went wrong and he wanted to get rid of him, he could," but that if a man did his work satisfactorily he probably would be hired for the season (R. 135, 136); that, if available it was the usual practice of the respondent to take back the operators they had had the season before (R. 119), and that so far as he knew, Tom Desper was to be used as an operator during the 1948 season. (R. 180.)

Petitioner made no effort to prove that decedent had signed seaman's articles in connection with his work for defendant, and an examination of the books and records in defendant's office after the accident disclosed no such papers or documents. (R. 134.)

Prior to April 26, 1948, the respondent had elected to conduct and operate its business and employment under and pursuant to the terms and provisions of the Workmen's Compensation Act of Illinois. (R. 26.) Such election was in full force and effect on the 26th day of April, 1948 (R. 26), and the injuries sustained by the petitioner's intestate resulting in his death were accidental and arose out of and in the course of his employment by the respondent. (R. 37.)

On January 6, 1949, the respondent filed an application for adjustment of claim with the Industrial Commission to have the rights of the parties determined under the Workmen's Compensation Act of Illinois which under the laws of Illinois as it had a legal right to do. (*National Zinc Company* v. *Industrial Com.*, 292 Ill. 598). On March 29, 1949, Anna Desper, mother of the decedent, for herself and as mother and next friend of Katherine Desper, minor sister of decedent, also filed an application for adjustment of claim with the Industrial Commission of Illinois. (R. 15, 27.)

On July 28, 1949, after due notice to the parties' attorneys, a hearing was had before an arbitrator designated by the Industrial Commission on the application for adjustment of claim filed with the Industrial Commission by Anna Desper, mother of the deceased Thomas Desper, and on the application for adjustment of claim filed with the Industrial Commission by the respondent. (R. 18.)

At the hearing held July 28, 1949, on the said application for adjustment of claim, the parties were represented by counsel and Anna Desper, mother of the deceased Thomas Desper, was present and testified as did other witnesses concerning the issues presented in the case. (R. 28.)

Thereafter, on December 9, 1949, after consideration of the evidence and after submission to him of a memorandum of authorities by the respondent, the arbitrator entered his decision finding among other things that the petitioner's decedent, Thomas Desper, and Starved Rock Ferry Company, respondent herein, were operating under and subject to the terms and provisions of the Workmen's Compensation Act of Illinois on April 26, 1949—the date of the said Thomas Desper's fatal accident; that the said Thomas Desper did on such last-mentioned date sustain accidental injuries which did arise out of and in the course of his employment with the respondent, and the arbitrator ordered that compensation be paid the said Anna Desper by Starved Rock Ferry Company, respondent herein, in the sum of $19.50 per week for a period of 266 weeks and one week at $13.00 as is provided in paragraph (b) of section 7 of the Workmen's Compensation Act of Illinois. (Ill. Rev. Stat. 1949, Ch. 48, sec. 144(b)). (R. 19, 29.)

On December 15, 1949, following the entry of the arbitrator's decision, there was tendered to Anna Desper in accordance with the terms of said decision, the sum of $1716.00, the amount of the compensation which had then accrued, with the further offer by Starved Rock Ferry Company, respondent herein, to pay the remainder of the award—$3,484.00—either in installments or in a lump sum just as the said Anna Desper preferred, but this offer was rejected by the latter's counsel. (R. 20, 21, 30, 31.)

On December 16, 1949, there was filed with the Industrial Commission on behalf of the said Anna Desper, a petition for review of the arbitrator's decision which petition is still pending and at the present time remains undetermined. (R. 22, 23, 31.)

Summary of Argument.

The Jones Act is applicable only to members of the crew of a vessel plying in navigable waters. One who is engaged in conditioning a motor launch or its equipment, when the said launch is on dry land for later use on navigable waters, is not a member of a crew of such launch even though he might have operated it when it was later placed into the water. Such an employee is a shore worker and may recover for accidental injuries sustained in the course of his employment under the Workmen's Compensation Act of the State.

The 1939 amendment to the Federal Employers' Liability Act did not extend the provisions of the Jones Act so as to include shore workers even though the work performed by them did further future navigation.

Where, as in this case, the services were not rendered to a vessel in navigation and where the injury did not occur on a vessel on navigable waters there cannot be a recovery under the Jones Act.

ARGUMENT.

I.

The word "seaman", as used in the Jones Act, means a member of a crew of a vessel plying navigable waters.

It was incumbent upon the petitioner to prove, among other things, that decedent was a seaman as such word is used in the Jones Act.[1] "Seaman" may be stated succinctly to mean the master or a member of a crew of a vessel plying in navigable waters. The present inquiry may be confined to the definition of the word as it pertains to the members of a crew of a vessel; petitioner has nowhere seriously contended that the injury causing the death of decedent occurred on navigable waters.

In several cases decided in recent years this Court has stated in some detail the development of case and

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1 THE JONES ACT (41 Stat. 1007, 46 U.S.C. sec. 688):

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

statutory maritime law. Briefly, the Jones Act was enacted in 1920 after decisions by this Court holding that longshoremen, harbor workers, stevedores, and crew members injured upon navigable waters were not within the provisions of the Workmen's Compensation Laws of the several states. Later, these workmen were declared to be seamen within the meaning of the Jones Act and entitled to maintain actions under its provisions. (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52, and *Buzynski* v. *Luckenbach S. S. Co.*, 277 U.S. 226, 228.)

In 1927, after the decisions cited above, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act.[2] (44 Stat. 1426.)

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2. SEC. 2. "When used in this Act—

* * *

(3) The term 'employee' does not include a master or member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

* * *

"SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

* * *

This Court considered the Congressional intent and the policy underlying the Longshoremen's Act in *South Chicago Coal and Dock Co.* v. *Bassett,* 309 U.S. 251, 256, and declared that because of the enactment of such Act the meaning of the word "seaman", as used in the Jones Act, was narrowed from the interpretation announced in the *Haverty* opinion to exclude all "those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation acts were inapplicable."

Following the decision in the *Bassett* case, the significance of the word "seaman" and jurisdiction under the Jones Act have been defined and delineated in two very important decisions. The first such case is *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U.S. 26, where the Court said (p. 42):

> "The right of recovery in the Jones Act is given to seamen as such and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted *but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.*" (Emphasis supplied.)

The second important decision directly bearing upon the point now under discussion is *Swanson* v. *Marra Bros.,* 328 U.S. 1. In denying recovery to a longshoreman injured on shore, this Court said (p. 7):

> "We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act. But since this Act

is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore. The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel. * * *"

The distinction between members of a crew and the special set of rules governing them and landsmen who work in or about ships is illustrated by a report of the Senate Judiciary Committee, dated June 6, 1921, in connection with legislation concerning stevedores and state compensation statutes, Report No. 94, 67th Congress, First Session. In part, it reads:

"* * * The special treatment which seamen have always had under the acts of Congress was recently emphasized by the provision in the Merchant Marine Act of 1920 extending to seamen but not to other maritime workers the same rights of recovery in case of work accidents now enjoyed by interstate railway employees.

* * *

"Longshoremen and ship-repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each State exactly as other workmen in the ports in which they are employed. They are not migratory but local; their wages, their conditions of living are governed by local standards. They do not in all cases form a special class always employed in this work. The peculiar maritime law, applying to seamen, is inapplicable to their condition and no attempt has been made to apply it to them."

The statements of the law by this Court pertaining to recovery by maritime employees for injuries sustained in the course of their employment in maritime work are definitive, determinative and, of course, authoritative. Respondent earnestly and respectfully submits that the trial judge entirely misconceived this applicable law in including in his charge to the jury instructions Nos. 2 and 3 (R. 209-211; also see *colloquy*, R. 191-196) and in rejecting respondent's tendered suggestion No. 5. (R. 266-7.) Moreover, had the trial court properly understood the law as stated by this Court, he would have allowed respondent's motion for a directed verdict of not guilty (R. 43, 249) or its motion for a judgment notwithstanding the verdict. (R. 251.) These errors were corrected by the Court of Appeals and its judgment should be affirmed.

II.

The contention that an ordinary land laborer assisting in the preparation of boats for navigation is a member of a crew merely because he had been in the past and might be in the future cannot be sustained.

(a) Whether one is a member of a crew is determined by the nature of the services performed by him.

The year before the accident which is the subject matter of this suit Desper worked for the respondent from April 3d until December 10th—approximately eight months. (R. 117.) During that year he did all kinds of general labor work and, after he obtained his operator's license (dated June 17, 1947) he, among other things, operated one of respondent's launches until the season closed at the end of October. (R. 87, 102, 118, 224.) He was unemployed that winter but did, during at least a

part of that time, draw $20 a week compensation from the State. (R. 166.) The decedent returned to his employment with respondent about March 15, 1948. The purpose of his reemployment, stated most favorably to the petitioner, is thus stated in the record:

> "Q. I wish to ask you if you don't know it is a fact that Mr. Birkenbuel reemployed Thomas Desper, Jr., to help get the boats prepared for operation in 1948 and then to go out and work as an operator when the boats were in the water?
>
> "A. Yes." (R. 110.)

The boats went into the water about three weeks after the accident. (R. 109.)

The petitioner repeatedly says in her briefs that her intestate was hired as a seaman; that the work at which he was employed at the time of his death was merely incidental to the dominant purpose of his hiring. The record, however, as quoted above, leaves no doubt that the initial task of employment was to condition the launches and the barges for the summer season. While he might have operated a launch if his employment, which was terminable at will (R. 135, 136), persisted until the opening of the season, such contingency is conjectural. Liability should not be imposed upon such a supposition and it should not be used as a foundation for the determination of Desper's status at the time of the accident.

Petitioner urges that the legal conclusions which may be drawn in this case should be inferred from the alleged dominant purpose of the operation of a launch. That such activity was "dominant" is not only mere rhetoric but it is pure fiction. Why was the operation of a launch more dominant than assistance to the painter,

the machinest, the welder, or the other laborers? The launches could never have been operated upon the river without the prior important, essential and (then) dominant task of preparing them for such operation.

The cases cited on pages 14 and 15 of petitioner's REPLY BRIEF do not support her contention that at the time of the accident Desper's dominant duty was to operate a launch. They hold that if one incidentally performs some duty, contemporaneously in time, in addition to his principal work, such minor deviation from the main job does not require that his status be determined from the nature of the incidental task. Such cited cases do not mean that a court should utterly disregard all of the existing facts and look to something that may or may not be done three weeks in the future to ascertain the then nature of his then employment. If Desper had been injured during the summer season while he was momentarily employed in something other than the operation of a launch (R. 102, 129), perhaps petitioner's argument would have some weight. The distinction is illustrated by the quotation from *Weaver* v. *Pittsburgh Steamship Co.*, (6th Cir.) 153 F. 2d 597, 599 (which petitioner says neither the Court of Appeals nor the respondent commented on—REPLY BRIEF, p. 1):

> "On a special repair job on one of the ships of the appellee company, Rymarkiewicz was employed as a laborer from February 1, 1943, to March 13, 1943. During this particular period, he was not working under Articles. He worked only eight hours per day, five days a week, and for not more than forty hours in any work week. For this work, he was paid at the rate of ninety-three cents per hour. Were the Fair Labor Standards Act applicable to this particular six weeks' work done by Rymarkiewicz, there was actual compliance with the requirements of the Act during such time."

Manifestly, there is no difference between the work Desper was doing at the time of his fatal injury and that undertaken by Rymarkiewicz during the six weeks' period referred to in the court's opinion in the cited case. In each instance, the dominant work was removed from that of a crew member.

The test is the nature of decedent's relationship to a vessel plying in navigable waters and the character of the services rendered to such vessel.

The petitioner argues, beginning on page 1 of her REPLY BRIEF, that navigation is not essential to status as a member of a crew. This Court has repeatedly said that navigation is necessary to establish one as a member of a crew. The petitioner's argument is illustrative of her complete disregard of basic maritime principles in attempting to apply maritime law to the unfavorable facts in this case. From the early cases, some of which are reviewed in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259, to the late *Swanson* case, the meaning of "crew" is summarized as one who serves his ship "in her navigation" and the essentiality of the vessel's "plying in navigable waters" is consistently recognized.

The specific character of the relationship, and the nature of the services essential to constitute one a member of a crew have been subject to judicial interpretation on many occasions by reason of the proviso excepting members of a crew in section 3 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U.S.C., sec. 901 *et seq.*), so that today there is a substantial body of settled law to which reference may be had on the point.

In the leading case—*South Chicago Coal Co.* v. *Bassett*, 309 U.S. 258—where an employee sustained a fatal accident while at work on a vessel, the court said (p. 260):

> "This (Longshoremen's) Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, *supra*), were still regarded as distinct from members of a 'crew'. They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation. See *De Wald* v. *Baltimore & O. R. Co.*, (CCA 4th) 71 F. 2d 810; *Diomede* v. *Lowe*, (CCA 2d) 87 F. 2d 296; *Moore Dry Dock Co.* v. *Pillsbury*, (CCA 9th) 100 F. 2d 245.
>
> "The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water.'"

It is therefore obvious that not every person who renders service on board a vessel is a member of the

crew. Besides the specific nature of the actual work performed, certain other indicia are often considered to assist in determining the line of demarcation between members of a crew and ordinary shore or harbor workers. These indicia are outlined concisely in *Moore Dry Dock Co.* v. *Pillsbury*, (9th Cir.) 100 F. 2d 245, 247, where the court held one is not a member of a crew who is paid on an hourly basis rather than monthly, who neither eats nor sleeps on board a vessel, and who does not surrender his personal rights and liberties as a seaman in exchange for maintenance, care and wages. It should be observed that in this case Desper surrendered no liberties; he was free to terminate his employment at any time. (R. 135.)

So in *Henderson* v. *Jones*, (5th Cir.) 110 F. 2d 952, 953, an employee of a river vessel which was tied up whose duties were to fire a boiler, who had signed no seaman's articles, and who was paid by the hour only for the actual hours worked, and who ate and slept at home and worked only on the days needed, was held not to be a member of the crew.

And in *De Wald* v. *Baltimore & O. R. Co.*, (4th Cir.) 71 F. 2d 810, 813, a claimant whose principal work was in loading and unloading and keeping a record of the cargo, and who occasionally handled a line to make a barge fast at a dock, or to pump water out of it, and who did not live upon the barge but went home every night, was held not to be a member of a crew.

In *Diomede* v. *Lowe*, (2d Cir.) 87 F. 2d 296, upon facts substantially similar to those in the *De Wald* case, except that the claimant lived on the barge, it was held he was not a member of the crew.

The court in referring to the *De Wald* case said (p. 298):

> "The facts of that case are not materially distinguishable from the instant case. There the decedent worked on barges and scows; his employment differed only in two respects. He lived ashore and reported each morning and was given work on an average of three days per week; and the barge or scow did not go beyond Baltimore harbor. The court there held that he was not a member of the crew within the fair and common meaning of the words used in the excepting clause. See, also, *Harper* v. *Parker*, 9 F. Supp. 744 (D.C.D.Md.). The fact that the decedent lived aboard the scow and made trips beyond the harbor limits does not suffice to make him a member of the crew—a seaman within the meaning of the Act; nor does the fact that when outside the harbor limits he was exposed to the perils of the sea."

Many other cases involving the same question may be cited and while absolute agreement in all factual details cannot be expected, in the main the principal test for determining the legal status of a given person on board a vessel, *i.e.* whether or not a member of the crew, is whether his services rendered are chiefly to aid in navigation. *Taylor* v. *McManigal*, (6th Cir.) 89 F. 2d 583, 585; *Norton* v. *Warner Co.*, 321 U.S. 565, 572; *Schantz* v. *American Dredging Co.*, (3d Cir.) 138 F. 2d 534; *Spencer & Son Corp.* v. *Lowe*, (2d Cir.) 152 F. 2d 847, 848; *Hagens* v. *United Fruit Co.*, 2d Cir. 135 F. 2d 842, 843; *Petition of Spearin, Preston & Burrows*, (2d Cir.) 190 F. 2d 684, 687.

In the case at bar, decedent rendered no services in "aid of navigation" as that phrase is defined in the foregoing cases. If the duties and activities of the de-

cedent are considered from the date he began employment in March 1948, until the date of the accident, every service and duty which he performed was that of a shore worker. Despite what his duties might have been in the summer season, no service or duty which he actually did perform at the time of the accident had reference to the present navigation of a vessel or the movement of a vessel; the launches were on dry land and had been there since the previous November. Furthermore, deceased did not eat or sleep on board a vessel; he worked eight hours a day, was paid at an hourly rate, spent all of his time on shore or on the barges and did not incur the hazards of the sea; nor was he subject to ship discipline and he could quit at any time; nor was he assigned to a specific vessel. Neither the work he performed nor his relationship to any vessel was such as to constitute him a member of the crew of any vessel. Unless almost each and every distinction developed in the above-cited cases is to be wholly disregarded, the trial court should have directed a verdict for respondent.

Petitioner refuses to recognize either that the elapse of time or a change in the character and nature of the service which the employee actually performs can have any effect on the question of the determination of whether such employee is a member of a crew. She refuses to acknowledge that a factual change, such as the withdrawal of the boats from navigation, physically removing them from the navigable waters, storing them on dry land and leaving them there, or the severance of all relationship between the boats and those employed on or about them can have any legal effect on the status of those employed about such boats. Acceptance of her

theory requires a complete disregard of all relevant maritime law.

(b) The persons rendering services to vessels not in navigation at the time are not deemed members of a crew of a vessel.

The respondent was engaged in no operations at the time of the accident which can be legally characterized as "navigation." The only services rendered were in preparing the barges and motor launches for the summer. Neither the barges nor the launches had been set in motion, nor were they ready to be set in motion. The launches were still on dry land.

This Court, in *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, 52, recognized the principle that the actual duties at the time of the occurrence determine the status of the employee. When injured, Haverty, a stevedore, was performing duties *on a vessel in navigable water* such as were traditionally accomplished by seamen. Had he been doing other work at another place, as was the decedent in this case, it is believed that the Court would have reached the same result it did in the *Swanson* case.

In *Antus* v. *Interocean S. S. Co.*, (6th Cir.) 108 F. 2d 185, the accident occurred shortly after the sailing season ended and when the ship was being put in winter quarters; claimant, who had been a member of the crew during the sailing season, had been paid off, but had been retained on board to assist in laying up the vessel, and while doing such work he was hurt.

In holding that at the time of the accident there was no crew on board, the court declared that the fact he had been a member of the crew was of no significance. The court said (p. 187):

"But the question is whether at the time of the accident he was engaged in maritime work and the test is the nature of his employment at that time. While the work done had direct relation to navigation, it neither was performed during the navigation season nor was it even preparatory to navigation. Appellant was laying up the engine and packing the pumps and seacocks so that they would not freeze. He was taking bolts out of the piston-heads, an operation which was never done during navigation. It would have taken from four to eight hours to put the engines together again to operate. The vessel, while not consigned to a ship's graveyard, was tied up to the piles. Instead of doing this work in preparation for navigation, the men were preparing this vessel for winter quarters. *Appellant was not subjected to any maritime hazards. The fact that he had been, or expected in the future to be a seaman does not render maritime work which was not maritime in its nature. The finding of the District Court upon this point was correct, and appellant was not at the time of his injury a seaman. Therefore he was not entitled to sue under section* 688 *of Title* 46, U.S.C., 46 U.S.C.A. 688.

"Neither was appellant at the time of the injury a member of the crew. *The most that may be said is that he* (appellant), with the other men working on the boat, *expected to become members of the crew when it was organized and when the vessel was ready to sail.*" (Emphasis supplied.)

Long Island R. Co. v. *Lowe,* (2d Cir.) 145 F. 2d 516, 518 is peculiarly in point for in such cited case it was held that the Deputy Commissioner erred in taking into consideration the entire period of employment instead of the employees duties on the day of the accident in determining the status of the injured man.

A district court (*Mamat* v. *United Fruit Co.*, (S.D.N.Y.) 39 F. Supp. 103) dismissed a complaint under the Jones Act where a seaman had been discharged as a member of a crew and hired as a member of a shore gang to effect repairs and was not, then, under the direction of a ship officer.

Seneca Washed Gravel Corp. v. *McManigal*, (2d Cir.) 65 F. 2d 779, is also in point. In that case the claimant was a watchman on a vessel which was still in winter quarters at the time that he was injured. The ship was not placed in service until two weeks after the injury. He was held not to be a member of a crew.

The court said (p. 780):

> "While he attended the fires, he clearly was not employed as, nor was he, a member of the crew and he did nothing that assisted in any way the navigation of the ship. *The ship was not placed in the service of navigation until two weeks later.*" (Emphasis supplied.)

Another case controlling on this point is *Taylor* v. *McManigal*, (2d Cir.) 89 F. 2d 583. There the deceased was hired for the season as an assistant engineer on a vessel, but was doing general labor work on the vessel before the season started and as a part of the fitting out work when he was injured. The question arose whether, at the time of the injury, he was a member of the crew.

Holding to the contrary, the court said (p. 585):

> "The deceased was killed while working as a mechanic. He had not assumed the duties of assistant engineer. The most that may be said is that he, with other men working on the boat, expected to become members of the crew when it was organized and when the vessel was ready to sail."

In *Gonzales* v. *United States Shipping Board, E. F. Corp.*, (E.D.N.Y.) 3 F. 2d 168, where injuries were sustained on a vessel which was part of a laid up fleet, it was held that claimant was not a seaman. The test which determines whether they are seamen entitled to sue under the Jones Act is "navigation".

The court said (p. 170):

> "* * * And lacking this important element (navigation) these employees are not seamen, but are workmen employed by the government, and entitled to any and all rights of compensation covered by the said Compensation Act (Comp. St. § 8932a to 8932mm), * * * and, further that the boats of the 'laid-up fleet', on the facts before me, are not 'vessels' within the definition of the Revised Statutes, but are property of the United States, capable of being used as vessels to be sure; but until navigation takes place they are not within said definition."

And in *Hawn* v. *America S. S. Co.*, (2d Cir.) 107 F. 2d 999, arising from a suit under the Jones Act, the injuries occurred aboard a vessel lying in navigable waters which was being used to store grain.

Holding that the vessel, being presently withdrawn from navigation, had no crew, the court stated (p. 1000):

> "Navigation does not cease when the ship is in drydock for repairs awaiting new business * * * *On the other hand, she is withdrawn from navigation if she is laid up for the winter with a ship keeper* * * * The case at bar is between those two; she was not to transport goods but to store them." (Emphasis supplied.)

While a vessel temporarily out of service may be considered still in navigation as where the crew is kept intact and ship discipline observed, nevertheless, where

it is laid up for the winter or for a long period of repairs, its crew discharged and separated, it is then effectively withdrawn from navigation and commerce. *Union Oil Co.* v. *Pillsbury* (9th Cir.) 63 F. 2d 925, 926. Until it is returned to, and again has entered navigation, persons employed about such a vessel cannot be considered as members of a crew, but are merely a gang of shore workers. Here again, it is submitted, in the case at bar, neither the launches nor the barges had a crew, and the foregoing cases should have been controlling on the motion for a directed verdict, and for judgment notwithstanding the verdict.

III.

To constitute one a member of a crew there must be a relationship to a vessel, and it must ply in navigable waters.

It is true that, as the Court of Appeals said, under the *O'Donnell* case recovery may be had under the Jones Act even though the occurrence was on land. However, in the cited case, *there was an existing relationship to the operation of a vessel then plying in navigable waters.* The Federal courts may assume jurisdiction only by reason of the commerce clause of the Constitution or because the case is cognizable in admiralty. (*O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39.) There is no proof in the record that the respondent and its employees ever, at any time, engaged in interstate commerce; necessarily, therefore, petitioner must invoke admiralty jurisdiction. To do so, she must show that at the time of the fatality Desper had some connection with the sea. Congress in its authority over the sea cannot intrude upon the authority of the states over the

land with any greater propriety than the states can intrude upon the sea.

(a). The launches being conditioned for the season were on dry land.

On April 26, 1948, the day on which the accident occurred, the five motor launches were on land, resting on the rails of the marine track, blocked up on timbers. (R. 67, 92.) They had been there since the preceding October. (R. 87.) This is said by petitioner to be a "wholly irrelevant factor in determining decedent's status as a seaman." (REPLY BRIEF, p. 7.)

She gives no reason for such an astonishing categorical statement. Indeed, it is believed that none can be given for these are the very vessels in the employment of which she urges Desper was a member of the crew. It is submitted that this is the first time in the history of maritime jurisprudence that it was ever asserted that a vessel *on land* under the circumstances which exist in the instant case had a crew.

Petitioner cites cases which hold that a marine railway is equivalent to a dry dock in actions brought under the Longshoremen's Act. Whether a dry dock is floating or resting upon land is immaterial for maritime jurisdiction to attach. *The essential factor is that the vessel floats into it.* (*O'Hara's* case, 248 Mass. 31, 38.) Such controlling element is not present in the instant case and petitioner's citations cannot supply it. Moreover, in the instant case, the launches were stored on the tracks for the entire winter; they were not there temporarily for inspection of or repairs to their bottoms. (R. 126.) Furthermore, respondent urges that the reasoning in cases

such as *Norton* v. *Vesta Coal Co.*, (3d Cir.) 63 F. 2d 165, 166, *Rohlfs* v. *Dept. of Labor and Industries*, 190 Wash. 566, 570, and *Colonna's Shipyard* v. *Lowe*, (E.D. Va.) 22 F. 2d 843, 844, is far more persuasive than that in the cases petitioner cites in this connection.

To hold that these launches were not on land would be to substitute fiction for fact.

(b) The barges were not "vessels" in legal contemplation.

On the day of the accident and prior thereto only the respondent's barges were lying in Edwards Run. They had no motors, rudders, propellers, sails or means of movement. Part of the time the large houseboat barge on which Claudnic lived with his wife the year round, and on which the fatal accident occurred, rested on the mud, and part of the time it was afloat in the shallow water. It was not then being used, nor was it ever used by the respondent to transport goods or people. It is respectfully submitted that these barges were not vessels in legal contemplation.

Admiralty and maritime law make a distinction between structures that are held to constitute "vessels" and structures which merely float on water; the test is not shape, size, motor power or lack of it, past or future usage of the structure; the test is whether or not there is a present use in navigation and commerce. *Spinner* v. *Waterways Fuel & Dock Co.*, 70 Ohio App. 121, 125. It must be a structure presently used as a device or vehicle to transport goods or people on water. It is a mistake, common enough, to think that anything that floats is necessarily a "vessel" subject to maritime law. Many struc-

tures fastened to shore either permanently or for indefinite periods used not to transport goods or people, but as storage or other purposes, are not vessels. (*Cope* v. *Vallette Dry Dock Co.*, 119 U.S. 625, 627.) Transportation implies motion and carriage and the qualities of motion and carriage from place to place are essential elements or attributes before any floating structure can be held to be a "vessel" in maritime law.

A leading case on the subject is *Evansville & Bowling Greens Packet Co.* v. *Chero Cola Bottling Co.*, 271 U.S. 19, in which the facts bear close parallel to those in the instant case. In such cited case the question arose whether a wharf boat 243 feet long, 48 feet wide and 6 feet in depth lying on the Ohio River was a vessel. During the winter the boat was towed up to the Green River Harbor to protect it from the ice; in the summer it lay at Evansville. The boat contained offices and quarters at one end of the structure for the men in charge. The other part was used to transfer freight from the land to river steamboats and from one steamboat to another and these facts strongly resemble the facts in the case at bar.

In holding that the wharfboat was not a vessel, the Court said (p. 22):

> "The only question presented is whether appellant's wharfboat was a 'vessel' at the time it sank. It was an aid to river traffic, but it was not used to carry freight from one place to another * * * It served at Evansville as an office, warehouse, and wharf, and was not taken from place to place. The connections with the water, electric light, and telephone systems of the city evidence a permanent location. It performed no function that might not have been performed as well by an appropriate

> structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed. * * * Many cases involving a determination of what constitutes a vessel within the purview of the statute have been before the courts, but no decision has been cited, and we have found none, that supports the contention that this wharfboat was a vessel."

Other cases in point are *The Heindrich Hudson*, 11 Fed. cases, p. 1085, Fed. Cas. No. 6355; *Berton* v. *Tientjen & Lang Dry Dock Co.*, (D.C. N.J.) 219 Fed. 763, 771; *Hayford* v. *Doussony*, (5th Cir.) 32 F. 2d 605, and *W. F. & R. Boatbuilders, Inc.* v. *Hudson River Steamboat Co.*, (E.D. N.Y.) 9 F. Supp. 932, 933.

In the instant case the barge on which the accident occurred, and the other barges, like the structures in the foregoing cited cases, were not conveyances used to move and carry freight or persons. The houseboat barge on which the accident occurred was used as an appendage to the land and was firmly and securely fixed to the shore. In the winter it was firmly and securely attached to the shore in the shallow inlet—Edwards Run. With the opening of the summer season the barge was tied up to the shore at Starved Rock State Park, and after being so tied it remained stationary during the entire summer season. It was not moved but was used as a wharf or dock serving as an office, machine shop, storeroom, and waiting room, just like any wharf or other structure built on land. It lacked the essential characteristics of motion and carriage on water.

The barges not being vessels in legal contemplation, a person employed to work on and about them is not a member of a crew of a vessel, and as to any injuries

sustained by such person, the martime law does not apply. (*Hawn* v. *American S. S. Co.*, (2d Cir.) 107 F. 2d 999, 1000.

(c) The shallow, non-navigable waters of an inlet—such as Edwards run in the instant case—are not navigable waters of the United States.

The shallow pond in which defendant's three barges lay was not a navigable body of water; consequently, the further requirement of the *Swanson* case, namely, the operation of a vessel in navigable waters is lacking in the instant case.

Navigable waters of the United States are waters which actually carry commerce and navigation, or are capable of so doing in their present or natural state. Whether or not any given body of water is navigable is a question of fact to be proved. The body of water must be shown to be used or of being capable in its present state of being used as a thoroughfare for commerce between two or more of the several states. Edwards Run, the shallow inlet or pond in question, it is earnestly submitted, was not a navigable body of water of the United States, and very clearly was water within the exclusive jurisdiction of the State of Illinois.

The rule which distinguishes navigable waters of the United States from waters under state jurisdiction is clearly stated in *Leovy* v. *United States*; 177 U.S. 621. That case involved a pond or inlet which, as in the case at bar, was formed by overflow waters on some land situated in the State of Louisiana. The inlet, which was called Red Pass, connected with other bodies of water, some of which emptied into the Mississippi River and others into the Gulf of Mexico. Local officials dammed

the mouth of the inlet where it led into the Mississippi, and the question arose whether the body of water called Red Pass was within the jurisdiction of the Federal government or within that of the State of Louisiana. The evidence showed that small craft occasionally navigated the waters of Red Pass passing in and out where it opened into the Mississippi.

Holding that the body of water was not navigable water of the United States, but was subject to the jurisdiction of the State of Louisiana, the Court said (p. 637):

> "However that may be, our conclusion on the record now before us, is that Red Pass, in the condition it was at the time the dam was built, was not shown by adequate evidence to have been a navigable water of the United States."

Other cases in point are *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699; *United States* v. *Oregon*, 295 U.S. 1, 15; *Toledo Liberal Shooting Co.* v. *Erie Shooting Club*, (6th Cir.) 90 Fed. 680, 682; *Mintzer* v. *North American Dredging Co.*, (D.C. Calif.), 242 Fed. 553, 560, aff'd 245 Fed. 297, and *Beddow* v. *Smoot Sand & Gravel Corporation*, (App. D.C.) 128 F. 2d 608, 610.

In the case at bar, Edwards Run, the body of water in which the barges lay, was shown by the evidence to be non-navigable in fact. In origin it was overflowed land, with a depth of about two feet, and in length and width it was approximately 600 feet by 200 feet, with an irregular contour. (R. 50, 131, 145, 171.) It had no defined channel and it contained no docking facilities. (R. 127.) Other than the respondent's barges, no water craft of commercial character ever moved in and out of the inlet (R. 57, 169); the barges were moved in and out once each year and on those occasions, a channel had to be

staked out and the water in the pool behind the dam at Starved Rock had to be raised eight inches to a foot. (R. 50, 126, 127, 137, 144, 169.) The facts show further that a few row boats with fishermen or duck hunters used the inlet, but that because of the very shallow water, the mud and irregular bottom of the basin, outboard motors were unsuitable. (R. 59, 128.) No commerce ever moved over its waters. Edwards Run was not within the admiralty jurisdiction of the Federal government and very clearly a shore-fastened barge lying in it could not be considered as plying navigable waters.

IV.

The 1939 Amendment to the Federal Employers' Liability Act is wholly inapplicable in determining whether Desper was a seaman within the meaning of the Jones Act.

In an attempt to establish liability in the instant case, petitioner resorts to the 1939 Amendment to the Federal Employers' Liability Act.[1] She argues that the Jones Act which provides that in actions brought under such act "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable" compels a finding that anyone whose work directly or closely and substan-

(1) "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (53 Stat. 1404; 45 U.S.C. sec. 51.)

tially affects navigation is a member of a crew of a vessel in navigation. The assertion on page 17 of the PETITION to the effect that the 1939 Amendment to the Federal Employers' Act is a Congressional mandate which requires a corresponding enlargement in the construction of the Jones Act is simply an assertion which cannot be legally or rationally supported.

The effect of a reference statute is stated in 1 Lewis' Sutherland on Statutory construction, sec. 405, as follows:

> "* * * When, so adopted, only such portion is in force as relates to the particular subject of the adopting act, and as is applicable and appropriate thereto."

Judicial statements of the same rule may be found in *State* v. *Frear*, 144 Wis. 79, 99; *Jones, et al.* v. *Dexter, Adm. et al.*, 8 Fla. 276; *State* v. *Board of Commissioners*, 170 Ind. 595, 619; *Gadd* v. *McGuire*, 69 Cal. App. 347, 369; *State* v. *Board of Commissioners*, 83 Kan. 199, 203, and *State* v. *Board of Commissioners*, 175 Ind. 400, 403.

The precise question was decided by this Court adversely to petitioner's contention in *The Arizona* v. *Anelich*, 298 U.S. 110. In that case, brought under the Jones Act, the defense of assumption of risk was interposed because such defense was then meritorious in an action under the Federal Employers' Liability Act. In holding the defense without merit in a proceeding under maritime law this Court said (p. 123):

> "* * * The denial in the Federal Employer's Liability Act of the defense of assumption of risk refers only to suits founded on the Federal Safety Appliance Act, *applicable alone to railroads*. It can raise no inference as to the availability of the defense in suits brought to recover for injuries to seamen. No provision of the Jones Act is inconsistent

with the admiralty rule as to assumption of risk. The purpose and terms of the Act *and the nature of the juristic field in which it is to be applied,* preclude the assumption that Congress intended, by its adoption, to modify that rule of implication. * * *'" (Emphasis supplied.)

The "juristic field" embraced by the 1939 Amendment to the Federal Employers' Liability Act is succinctly stated in the report of the Senate Judiciary Committee (Senate Bill 1708, Report 661, 76th Congress, 1st Session):

> "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations."

However, the "juristic field" of the Jones Act is the one traditionally cognizable in admiralty,—the indemnity afforded by the maritime law to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle. (*O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43.)

The procedural rules applicable to proceedings in railroad cases were transferred to and are to be applied to the existing substantive maritime law. But merely because, under the Amendment to the Federal Employers' Liability Act, one whose work directly or closely and substantially affects interstate transportation by rail is entitled to the benefits of the Act, one who is a common laborer on land whose work relates to navigation does not become a member of a crew of a vessel in navigation. To use Sutherland's language, the subjects do not relate to each other, or, as this Court said, the nature

of the juristic fields in which they are to be applied are wholly dissimilar.

In short, no possible distortion of the plain language Congress used in the 1939 Amendment to the Federal Employers' Liability Act can make a seaman out of one who is not a seaman under maritime law. The one Act relates to railroad employees engaged in interstate transportation by rail; the other to seamen as such, whether or not they are engaged in commerce between the states.

It must be presumed that when the 1939 Amendment was enacted, Congress knew of the rule of interpretation stated by Sutherland and applied by this Court in *The Arizona* case. *Farrington* v. *Commissioner of Internal Revenue*, (1st Cir.) 30 F. 2d 915. (Cert. den. 279 U.S. 873.) If Congress had intended a "mandate" such as is contended for, it would have unmistakably said so. Common sense, reason and logic demonstrate that petitioner's position is untenable. Legal precedents, without dissent, reject the highly irrational theory she advances.

The futility of the attempt to apply the 1939 Amendment to the instant case is now recognized by the petitioner by her virtual abandonment of this argument (PETITION, p. 18; Petitioner's REPLY BRIEF, pp. 20, 22). Impliedly, she concedes that she cannot try her case on one theory in the court below and upon another in this Court (*Barnsdall Refining Corp.* v. *Cushman-Wilson Oil Co.*, (8th Cir.) 97 F. 2d 481, 484) for she now says that her theory "was and is that if decedent was hired for the season to operate defendant's boats, and to get them ready for operation, he was a member of the crew not only while he was running the boats but also when he

was doing the fitting out work." (Petitioner's REPLY BRIEF p. 20.)

This same proposition is embraced in instruction No. 3 (R. 210) which was defended in the trial court solely because of the alleged applicability of the 1939 Amendment to the Federal Employers' Liability Act. (R. 193). Instruction No. 2 (R. 209) paraphrases the said amendment so the only instructions tendered by petitioner and given by the trial court embracing the concept of seamen under the Jones Act rest for legal support on the Amendment of 1939.

Moreover, petitioner's objection to respondent's suggested instruction No. 5 (R. 267) was because such instruction ignored the 1939 Amendment. (R. 197, 198.) Further, she stated at the trial (R. 194):

> "The Court: Well, that is their theory of this lawsuit. If they can't sustain that theory, they don't have any lawsuit.
>
> "Mr. Davidson (for petitioner): That is the whole thing in a nutshell."

It is apparent that the entire portion of the trial court's charge concerned with the legal definition of a member of a crew is based solely upon the supposed relevancy of the 1939 Amendment to the Federal Employers Liability Act. How, then, can it be seriously urged that even if the Amendment is inapplicable to Jones Act suits, the error is harmless?

The petitioner suggests that the word "employment" in the two statutes should be identically construed. The one act affords a remedy to *any person* employed by a common carrier by railroad in furthering or substantially affecting interstate commerce whereas the Jones Act

gives a right of action at law to any *seaman* injured in the course of his employment. The problem of whether Desper was a "seaman" within the meaning of the Jones Act can neither be obscured nor solved by a dissertation on the meaning of the word "employment" or by a review of the decided cases construing the phrase "in the course of his employment" or any other words or phrases other than "seaman." Hence *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, and the other cases cited by petitioner on this point can be of no assistance to the Court.

It is urged that because the survival features of the Federal Employers' Liability Act (*Nordquist* v. *U. S. Trust Co.*, (2d. Cir.) 188 F. 2d. 776) and the three year limitation period prescribed by that law (*Chisholm* v. *Cherokee-Seminole S. S. Corp.*, (S.D.N.Y.) 36 F. Supp. 967) apply in Jones Act cases, Desper was a seaman at the time of the fatality.

The Court, in the *Nordquist* case, plainly says that it is reading into the Jones Act words that Congress omitted from it, and that it would not do so except that otherwise the plaintiff would be remediless. In the instant case petitioner is not remediless because she has heretofore recovered under the Workmen's Compensation Law of Illinois and payment of the award has been tendered to her. The doctrine was applied in the cited case by the Court of Appeals for the Second Circuit in that "strictly limited sphere." It is clear that the court would not have extended it to this case.

The statute of limitation cases are not analogous for under English and American law such defense is a matter of procedure. (*Pritchard* v. *Norton*, 106 U. S. 124, 130, 131.) There is no doubt that the procedure of the Federal

Employers' Liability Act governs the administration of the substantive maritime law under the Jones Act. Such question was not even raised in the cases cited by petitioner—in those cases the point at issue was whether the two-year limitation in effect at the time of the enactment of the Jones Act or the three-year limitation provided by the 1939 amendment was to be applied. Moreover, the time in which suit may be commenced by railroad employees and by seamen falls within the same "juristic field" but "railroad employees getting their trains ready for interstate movement and seamen preparing their ships for navigation" (Petitioner's REPLY BRIEF, p. 19) manifestly do not. Desper could have the status of a seaman under the Jones Act only if his activities met the requirements of the legal definition of a member of a crew of a vessel plying navigable waters. This has been fully discussed hereinbefore.

To construe the 1939 Amendment in the manner contended for would, in most instances, effect a judicial repeal of the Longshoremen's Act for, in many respects, longshoremen are seamen and their duties almost invariably further navigation. It is thus necessary to limit the benefits of the Jones Act to members of a crew of a vessel in navigation, as was done in the *O'Donnell* and *Swanson* cases. If such is the seaman's status, the 1939 Amendment neither helps nor hurts him; if it is not his status, to afford him a remedy under the Jones Act is to deprive the seaman who is not a member of a crew of the equal or greater benefits of the Longshoremen's Act and the Workmen's Compensation Acts of the several states. Surely Congress had no such intention when, solely at the behest of the railroad brotherhoods, it enlarged the field of interstate transportation by rail and included

therein railroad employees who theretofore had been without the provisions of the Act.

To give the amendment under discussion the effect petitioner claims, it would be necessary, by construction, to eliminate the words "interstate" and "or foreign" and to substitute the word "navigation" for the word "commerce." Such algebraic process of elimination, subtraction, substitution and addition would constitute unwarranted judicial legislation. Until such time as Congress amends (if it constitutionally can) the Jones Act to extend its benefits to those whose duties "shall be the furtherance of" or shall "in any way directly or closely and substantially affect" navigation, the remedy provided by the Act is available only to members of the crews of vessels in navigation upon navigable waters.

It is only by petitioner's interpolation and substitution of the word navigation for commerce and by analogy that she arrives at her argument. In other words, petitioner does not rely on the 1939 Amendment as enacted by Congress, but on her own private revision of it and on an analogy which she contrives to fit the exigencies of the situation. There is a double evil in this argument, for not only does it require this Court to change fundamental words in the 1939 Amendment, but also to add fundamental words to the Jones Act not presently there. No legal authority supports such procedure and it is submitted it would be giving unwarranted force to use of rhetoric if this attempted construction should be held to repeal the Longshoremen's and Harbor Workers' Act and overrule many decisions of this Court and United States courts of appeals.

Bearing in mind that there is no express language in the 1939 amendment relating to maritime law, it is sub-

mitted that had Congress intended a new and different meaning should be given to the words "seaman" and "employment", and had intended to alter the maritime law, and to overrule the cases cited herein, Congress would have used more direct and express means than concealing within the 1939 Amendment an alleged analogy which petitioner so extensively emphasizes in her briefs.

Finally, it is believed pertinent to observe that in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, this Court said (p. 259):

> "* * * We find little aid in considering the use of the term 'crew' in other statutes having other purposes. * * *"

If this Court is not assisted by reference to other maritime statutes, how can a law enacted solely for the benefit of railroad employees possibly aid it in determining the status of one as a member of a crew?

V.

The Decision of the Court of Appeals Is Not in Conflict With the Cases Cited by Petitioner.

Hunt v. *United States*, (S.D.N.Y.) 17 F. Supp. 578, cited on page 15 of the PETITION, was decided before the *Marra* case. Hunt was admittedly a seaman and was hired as a member of the crew; the vessel was tied up awaiting its next voyage, and moreover, Hunt "slept and ate on the boat, was subject to discipline demanded and the orders and directions given by the master and/or chief officer directly, or through the boatswain." Under the record in the instant case there was no ship's discipline; there was no master; there was no chief officer, there was no boatswain, and Desper neither slept nor

ate on any vessel but instead lived at his home. The court that decided the *Hunt* case made these same distinctions, in *Mamat* v. *United Fruit Co.*, (S.D.N.Y.), 39 F. Supp. 103 and added that in the case then under consideration the seaman had been discharged as such and rehired as a member of a "shore gang" to effect repairs. That is precisely the situation which obtains in the case at bar—Desper's service as an operator of a launch was terminated at the end of October and from then on such services as he performed were those of a shore worker. That he was paid at the same rate can be of no significance for the nature of the work performed cannot be determined by the amount of pay received. Furthermore, the same court that decided the *Hunt* case, in *Gonzalez* v. *Riverside & Fort Lee Ferry Co.*, (S.D.N.Y.) 43 F. Supp. 366, 367, (decided in 1942), rejected the very argument petitioner makes here—that the fact that the libellant had sometime been a member of a crew and that his work aided navigation entitled him to recover under the Jones Act.

Moreover, as the Court of Appeals said in this case, the *Hunt* case "merely serves to emphasize the factors, lacking in the case at bar, which serve to make one a seaman for the purposes of the Act."

United States v. *Lindgren*, (4th Cir.) 28 F. 2d 275, referred to on page 15 of the PETITION, is not in point for at least two reasons: *First*, it was admitted by the pleadings in such cited case that the decedent, who was signed as third mate, was a seaman, and *second*, the court relied principally on the *Haverty* case as precedent for its decision, a case which is not an authority for the definition of the word "crew", as distinguished from "seaman".

Jones v. *Shepard,* (S.D. Miss.) 20 F. Supp. 345,—a District Court opinion which was not appealed—is also cited on page 15 of the PETITION. There, apparently, the deceased was recalled *as a member of the crew* the day before the ship was to sail and on that date was killed. He was and had been doing work that a roustabout would do, whether or not the vessel was in motion. Such a case is not authority in the instant case where, according to the record, Desper was hired to do "general labor." (R. 87.)

It may be pertinent to observe that the *Hunt, Lindgren* and *Jones* cases are all cited in *Weaver* v. *Pittsburgh Steamship Co.,* (6th Cir.) 153 F. 2d 597, also cited on page 15 of the PETITION. The *Weaver* case arose under the Fair Labor Standards Act. Thus, it does not involve the Jones Act, the Longshoremens Act, or even an ordinary libel. The distinction between the cases petitioner cites and the one at bar is aptly illustrated by the language of the court in the *Weaver* case (page 601 of the report) in distinguishing it from the *Taylor* and *Antus* cases.

Petitioner also relies on *Daffin* v. *Pape,* (5th Cir.) 170 F. 2d 622, which is purportedly summarized on page 15 of the PETITION. Such cited case is directly in point on the proposition elsewhere herein urged by the respondent, namely that the character of the work being done at the time of the injury determines the injured's status as a seaman. In the *Daffin* case the Court of Appeals flatly rejected the contention that the general character of the deceased's employment rather than its nature when he was fatally injured should determine whether the Jones Act afforded a remedy. The following quotations from the opinion are on that point:

(P. 624) "We think it clear from the *Warner Co.* case (*Norton* v. *Warner Co.*, 321 U.S. 565) that, *since the facts having to do with the services Daffin was performing on the yacht at the time of the injury* are undisputed, the question whether he was a member of the crew * * * is a question of law * * *. the yacht *at the time* was in port, yet it nevertheless must be considered to have been in navigation, for it remained in readiness for another voyage.

(P. 625) "* * * *The employee's duties on the day of the accident are the critical facts which should determine his status as a member of the tug's crew.* It is true that if he had been called aboard for a single act of service, he might not become a member of the crew. But on the days when his employer assigned him to serve as a 'mate' of the vessel, we hold that he was a crew member, although he might cease to be one on days when he was assigned for other duties. See to the same effect *Maryland Casualty Co.* v. *Lawson*, 5 Cir., 94 F. 2d 190; *Osland* v. *Star Fish & Oyster Co.*, 5 Cir., 107 F. 2d 113." (Emphasis supplied.)

Carvalho v. *Fregata*, (D.C. Mass.) 42 F. Supp. 404, (Reply Brief, p. 15), is distinguishable because in that case there was *then* a vessel, *then* a crew, the vessel was *then* in navigable waters, and it was found by the court *then* to be in navigation. Any one of these factual differences between the cited case and the instant one is sufficient to distinguish it completely from the case at bar.

VI.

The State of Illinois under the circumstances existing in the instant case may validly and properly assume jurisdiction over the claims filed by the parties under the provisions of the Illinois Workmen's Compensation Act.

Both petitioner and respondent filed application for adjustment of claim with the Industrial Commission of Illinois. (R. 15, 27) A hearing was held before the Industrial Commission on the cause, at which hearing the parties were represented by counsel and at which Anna Desper, mother of the deceased Thomas Desper, was present and testified as did other witnesses concerning the issues in the case. (R. 28.)

An award was entered by the arbitrator in favor of petitioner and a check for the accrued amount of compensation under the terms of the award was tendered to her which tender was refused. (R. 19, 20, 21, 30, 31.)

Under recent holdings of this Court, jurisdiction under a State workmen's compensation law may now be validly and properly taken by a State in cases involving shore workers doing repair on vessels in navigable waters. These cases go much farther than in the instant case where the repair work being done by decedent at the time of the accident was not being performed on navigable waters.

The cases to which reference is here made are *Bethlehem Steel Co.* v. *Moore,* 335 U.S. 874, affirming *Moore's* case, 323 Mass. 162, 165 and *Baskin* v. *Industrial Accident Commission,* 338 U.S. 854, vacating the judgment entered in *Baskin* v. *Industrial Accident Commission,* 89 Cal. App. (2d) 632, which was reconsidered in *Baskin* v. *Industrial Accident Commission,* 97 Cal. App. (2d) 257, 260. (Aff'd 340 U.S. 866.)

In *Moore's* case the employee suffered an injury as the result of slipping on the step of a gun mount while he was aboard a vessel being repaired in a dry dock floating in navigable waters of the United States. The injured employee worked at various tasks on piers, dry docks, and on ships; part of the time he worked on land and part of the time on navigable waters where, as mentioned, the injury occurred. The law of Massachusetts since *O'Hara's* case, 248 Mass. 31, had held that injuries on navigable waters occurring under such circumstances were governed by maritime law.

The Massachusetts court, in its opinion, reviewed the decisions of this Court and concluded that the case of *Davis* v. *Department of Labor and Industries of Washington*, 317 U.S. 249, altered the law as it had been previously interpreted by the Massachusetts court in *O'Hara's* case and concluded that the matter on appeal came within the Workmen's Compensation Law of the Commonwealth.

In *Baskin* v. *Industrial Accident Commission*, 97 Cal. App. (2d) 257, 260, *supra*,—which as above stated was decided on the remanding order of this Court in *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854,—the facts were substantially similar to those in *Moore's* case in that the injured employee went on board a vessel lying in navigable water and being repaired, and while on board the vessel sustained injuries. A claim was filed with and dismissed by the Industrial Commission.

In its opinion, after remandment, the California court said that because of the decision of this Court in *Moore's* case, it was clear that under the *Davis* case the California Commission had jurisdiction to proceed and to determine the merits of the petitioner's application.

Other cases applying the same rule are *Emmons* v. *Pacific Indemnity Co.*, 146 Tex. 496, 502; *De Graw & Todd Shipyards Co.*, 134 N.J.L. 315, 316, cert. denied *ri sub nomine*, 329 U.S. 759, and *Allisot* v. *Federal Ship Building & Dry Dock Co.*, 4 N.J. 445, 453.

In the instant case, Thomas Desper's injury did not occur on navigable water; however, aside from this distinguishing fact which in the light of the decisions in the cases cited under this point makes petitioner's contentions even less tenable, the services rendered by the deceased from the date of his hire—March 15, 1948—until the date of his fatal accident—April 26, 1948—were generally speaking identical with the services being rendered by the employees in the cited cases, *viz.*: repair and conditioning work.

By virtue of its decisions in the *Moore* and *Baskin* cases, this Court has now recognized the right of a state to take jurisdiction over such workers when the injury occurs even on navigable water. How much more impelling reason is there, therefore, to recognize the jurisdiction of the State of Illinois in the instant case where the injury did not take place on navigable waters, and where there was not even a vessel lying in, or plying, navigable waters with reference to which admiralty jurisdiction could attach.

CONCLUSION.

The test which defines a seaman within the meaning of the Jones Act as declared by this Court and the various courts of appeal is that the status depends on the nature of the services rendered as a member of a crew of a vessel plying in navigable waters. It is respectfully submitted that the trial court misconceived the law applicable and erred in instructing the jury, as evidenced in instructions Nos. 1, 2 and 3, in rejecting respondent's tendered instruction No. 5, and in failing to grant respondent's motions for a directed verdict and for judgment notwithstanding the verdict. The Court of Appeals therefore properly reversed the judgment.

If the test is properly applied to the facts of the instant case, then it must follow that (1) the decedent was not a "seaman" within the meaning of the Jones Act; (2) that the nature of the services rendered by decedent at the time in question were not of the character which identify a member of a crew of a vessel; (3) that decedent stood in no relationship to any specific vessel as to which he might be considered a member of the crew; (4) that the decedent was not engaged in navigation at the time of the event in question for the reasons (a) the launches rested on dry land, and (b) the barges and in particular the one on which the injuries occurred were not vessels in contemplation of law, and (5) that the injuries to decedent did not occur on navigable waters for the reason the shallow inlet—Edward's Run—was not navigable water of the United States.

Furthermore, it is respectfully submitted that upon the facts of this case, and under the law as declared by this Court in its very recent decisions, jurisdiction over the injuries, and the rights and liabilities of all the parties resulting from the injuries are properly within the State of Illinois. The award of the arbitrator granting compensation to the decedent's dependent under the Workmen's Compensation Act of Illinois was a valid exercise of State jurisdiction and should have been recognized by the district court below.

It is respectfully submitted that the judgment of the Court of Appeals herein should be affirmed.

Respectfully submitted,

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